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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1723

JOHN L. HILL, Attorney General of Texas,
Appellant,

vs.

MICHAEL L. STONE, et al.,
Appellees.

BRIEF AMICUS CURIAE ON BEHALF OF EL PASO COUNTY JUNIOR COLLEGE DISTRICT, URGING AFFIRMANCE

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BRIEF AMICUS CURIAE ON BEHALF OF EL PASO COUNTY JUNIOR COLLEGE DISTRICT, URGING AFFIRMANCE

The respective counsel for the Attorney General of Texas, the Mayor and City Council of the City of Fort Worth, and Michael L. Stone have filed with the Clerk written consents to the filing of this Brief *Amicus Curiae*, pursuant to Rule 42(2) of the Supreme Court Rules. Written consent has been obtained from all parties to the case.

QUESTION PRESENTED

Are the Texas constitutional and statutory provisions restricting the franchise in general obligation bond elections to persons who have rendered property for taxation violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

INTEREST OF AMICUS CURIAE

The El Paso County Junior College District (hereinafter referred to as the "College District") is a political subdivision of the State of Texas organized and maintained under the provisions of the Texas Education Code.[1] Its purpose is to provide "(1) technical programs up to two years in length leading to associate degrees or certificates; (2) vocational programs leading directly to employment in semi-skilled or skilled occupations; (3) freshmen and sophomore courses in arts and sciences; (4) continuing adult education programs for occupational or cultural upgrading;

1. TEX. EDUC. CODE ANN. §130.001 (1972) *et seq.* The formation of a county junior college is initiated by ten percent of the qualified taxpaying electors of the proposed district petitioning the county school board or, if there is no county school board, the county commissioners' court. TEX. EDUC. CODE ANN. §130.033(c) (1972). The board or court examines the petition, and if it is legally sufficient, it is forwarded to the Coordinating Board, Texas College and University System. TEX. EDUC. CODE ANN. §130.035 (1972). The coordinating board, with the advice of the commissioners of higher education, determines if the requisite statutory conditions have been met, and if "it is feasible and desirable to establish a junior college district." TEX. EDUC. CODE ANN. §130.036 (1972). The coordinating board is obligated to consider "the welfare of the state as a whole, as well as the welfare of the community involved." *Id.* The interests of the taxpayers or renderers, therefore, are not the only interests considered, even though the amount of taxable property valuation of a proposed district must be at a certain level in order to create a junior college district. TEX. EDUC. CODE ANN. §130.032 (1972).

The decision of the coordinating board is issued to the county school board or the county commissioners' court, and, if favorable, the appropriate county body orders an election. TEX. EDUC. CODE ANN. §130.037 (1972). A majority of all voters "shall determine the question of the creation of the junior college district . . . and the election of the original trustees." TEX. EDUC. CODE ANN. §130.038 (1972). If the election also determines propositions for the issuance of bonds or the levying of taxes, only those electors who satisfy the requirements of Article VII, §3 and Article VI, §3a of the Texas Constitution may vote on the propositions. TEX. ATT'Y GEN. OP. No. M-1139 (1972). See also Shepard v. San Jacinto Junior College Dist., 363 S.W. 2d 742 (Tex. 1963). All electors may vote on the creation of the district, but if the district is to issue bonds or levy taxes the electorate is restricted.

(5) compensatory education programs designed to fulfill the commitment of an admissions policy allowing the enrollment of disadvantaged students; (6) a continuing program of counseling and guidance designed to assist students in achieving their individual educational goals; and (7) such other purposes as may be prescribed by the Coordinating Board, Texas College and University System, or local governing boards, in the best interest of post-secondary education in Texas."[2]

The College District receives money appropriated from the state treasury[3] and from the collection of tuition and fees.[4] All funds so received must be used solely "for the purpose of paying salaries of the instructional and administrative forces [of the College District] and the purchase of supplies and materials for instructional purposes."[5] If a junior college district is to have classroom buildings and other structures it must issue general obligation bonds supported by a tax levied for their payment.[6] On September 21, 1974, in order to construct campus buildings, the College District conducted an election to determine (1) if a Junior College Maintenance Tax should be implemented, and (2) if general obligation bonds should be authorized together with a tax to support their payment.

The conduct and outcome of the El Paso election was similar to the April 11, 1972, Fort Worth election. The propositions in both elections were submitted to the electorate by a system of dual balloting. Qualified electors who had rendered property for taxation voted separately

2. TEX. EDUC. CODE ANN. §130.003(e) (Supp. 1974).
3. TEX. EDUC. CODE ANN. §130.003(a) (Supp. 1974).
4. TEX. EDUC. CODE ANN. §130.003(b)(4) (Supp. 1974).
5. TEX. EDUC. CODE ANN. §130.003(c) (Supp. 1974).
6. TEX. EDUC. CODE ANN. §130.122 (1972).

from qualified electors who had not rendered property for taxation. As in the case of the Fort Worth library bonds, a majority of all El Paso voters approved the bond issue and tax, but a majority of those who had rendered property for taxation disapproved the issuance and tax.[7]

Under the authority of Articles VI, §3a and VII, §3 of the Texas Constitution,[8] and Articles 5.03 and 5.04 of the Texas Election Code,[9] the ballots cast by the non-renderers are invalid. The non-renderers' votes were canvassed only to assure "that bonds issued were compatible with both the Texas Constitution and the United States Constitution."[10] It has been the policy of the Texas Attorney General, who is required to approve bonds issued by junior college districts,[11] not to grant such approval unless a majority of

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7. The election results were as follows:

	Owners of Property Rendered for Taxation	Non Renderers	Total
Proposition One			
Junior College District Maintenance Tax			
For	9,614	2,026	11,640
Against	9,734	370	10,104
Proposition Two			
The Issuance of Junior College District Bonds and Levying the Tax in Payment Thereof			
For	9,547	2,016	11,563
Against	9,791	378	10,169

8. TEX. CONST. arts. VI, §3a; VII, §3. See page A1, *infra*.

9. TEX. ELECTION CODE ANN. arts. 5.03; 5.04(a) (Supp. 1970). See pages A2 and A3, *infra*.

10. Brief of Appellant at 3.

11. TEX. EDUC. CODE ANN. §130.122 (d) (1972).

both renderers and non-renderers have voted in favor of the bond issue. Although the majority of citizens voting in the election favored the issuance of the bonds, no issue has taken place because of Texas' constitutional and statutory prohibitions.

Certain non-rendering electors residing in the College District have challenged the Texas rendering scheme in the United States District Court for the Western District of Texas in a suit styled *David E. Hilles, et al.* v. *John L. Hill, Attorney General of Texas, et al.*, No. EP-74-CA-215. The College District is a party defendant to said suit, and has answered that the laws of Texas prohibit the issuance and sale of the bonds.

The laws which have discriminated against a large segment of the El Paso population, also have stymied the ability of the College District to provide adequate facilities for its students. The College District has an interest in the outcome of case at hand, and would urge that the Texas constitutional and statutory provisions restricting the franchise in bond elections be held as violative of the Equal Protection Clause of the Fourteenth Amendment. The situation presented by the City of Fort Worth and that of the College District are dissimilar in only one way: the breadth of the powers of the city exceed those of the college. The College District, therefore, maintains an additional interest in expressing the views of a governmental unit possessing powers less than those of a city. The *amicus curiae* would assert that its powers and functions are sufficiently broad to be considered as normal governmental activities having a substantial impact upon the entire community. The College District is especially interested in any definition that the Court might frame setting out the relation between voting rights and local governmental powers.

SUMMARY OF ARGUMENT

The State of Texas, through constitutional and statutory provisions prohibits a definable class of citizens from voting in general obligation bond elections. Unless a resident renders his property, or a portion thereof, for taxation, he cannot vote in such a bond election. By restricting the franchise in this manner, the state has infringed on a constitutionally protected right. The laws authorizing this infringement must be strictly reviewed to determine if they are necessary to promote a compelling state interest.

The well-established doctrine of "one person, one vote" extends to political subdivisions of the state which exercise general governmental powers and affect the interests of its constituents. Intangible as well as concrete financial interests are affected by the outcome of bond elections, and both interests must be weighed in determining Equal Protection claims. An interest in educational quality or civic improvement need not be exclusively tied to economic considerations in order to be entitled to constitutional protection. Recognition also has been granted to indirect economic interests. The citizen whose rental payments and consumer costs will be affected by a bond election is entitled to cast a ballot. Texas has unconstitutionally restrained members of the disenfranchised class from protecting these justiciable interests at the polls.

The right to vote, however, does not extend to extremes of the governmental spectrum. This narrow exception to the "one person, one vote" rule applies to specialized units of government which have a disproportionate effect on a particular group. Both a "special function" and a "disproportionate effect" are required to invoke the exception. A special-function governmental unit having a

substantially equal effect on all constituent groups would be required to have an unrestricted franchise.

The City of Fort Worth is not a specialized unit of government and the issuance of bonds is not a special function of government. The citizenry as a whole has a stake in, and will be affected by, a general obligation bond election, but the state recognizes only direct economic interests. A large class of citizens has been excluded from bond elections even though they have a recognized interest in the outcome.

The restrictive franchise is not necessary to promote any compelling state interest. The statutory scheme is vaguely directed toward the collection of taxes. By conditioning the franchise on rendition, the state reasons, property holders will be encouraged to render their property for taxation. Not only is this goal ill-served by the rendition requirement, but it is totally unrelated to the establishment of legitimate voter qualifications. Any amount of property may be rendered to satisfy the voting requirement; rendition of near valueless property will entitle the owner to vote. It cannot be urged seriously that the renderer has become a better voter or that his stake in the election outcome has increased. Nonetheless, he is allowed to vote, while other citizens who will be substantially affected by the election cannot.

The rendition requirement is discriminately administered. The local tax assessor seeks out certain types of property, thereby enfranchising the owners either when the property is voluntarily rendered or when the assessor places it on the tax rolls. Owners of property unsought by the assessor must render items which the assessor requires no other citizen to render. An unequal burden is placed on this class of citizens.

ARGUMENT

I. The Texas Constitutional and Statutory Provisions Restricting the Franchise in General Obligation Bond Elections to Citizens Who Have Rendered Property for Taxation Must Be Strictly Scrutinized to Determine If the Provisions Are Necessary to Promote a Compelling State Interest.

A. An Infringement on a Constitutionally Protected Right Requires That the Infringement Be Reviewed to Determine If It Is Necessary to Promote a Compelling State Interest.

The extent to which the Constitution requires the franchise to be extended within local governmental units has been measured by an emerging standard. At various times, the Court has considered whether a governmental unit has "power to make a large number of decisions having a broad range of impacts on all citizens of the county,"[1] whether a limitation upon the local franchise denies some citizens an "effective voice in the governmental affairs which substantially affect their lives,"[2] and whether such a limitation is applied to the selection of "persons by popular election to perform governmental functions."[3]

In examining statutory classifications challenged as being violative of the Equal Protection Clause, a court must first choose the degree of judicial scrutiny to be applied. The inquiry into the nature of local governmental power and its corresponding impact on the interests of

1. Avery v. Midland County, 390 U.S. 474, 483 (1968).

2. Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969).

3. Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970).

the citizen is undertaken for this reason. "The character of the classification in question, the individual interests affected by the classification, and the governmental interests in support of the classification"[4] must be analyzed in order to select the level of scrutiny.

If an individual interest is "an established constitutional right, [the Court] gives to that right no less protection than the Constitution itself demands."[5] Such protection takes the form of strict scrutiny because, "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely and carefully confirmed."[6]

The right to vote is "a fundamental right, because preservative of all rights"[7] requiring, as a consequence, that any infringement thereupon be carefully and meticulously scrutinized.[8] As Justice Douglas stated in *Harper* v. *Virginia State Board of Elections*, "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[9] The right to vote in state and local elections is "close to the core of our constitutional system"[10] and is entitled to rigorous protection by the courts. If it cannot be shown that statutory infringements upon voting rights are necessary to promote a compelling state interest, the statute should fall.

4. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

5. Shapiro v. Thompson, 394 U.S. 618, 642 (1969).

6. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966).

7. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

8. Reynolds v. Sims, 377 U.S. 533 (1964).

9. 383 U.S. at 665.

10. Carrington v. Rash, 380 U.S. 89, 96 (1965).

Exacting scrutiny also is applied to classifications found to be "suspect." When race or national origin are made the basis of withholding a benefit, the statute authorizing the distinction must be shown to be necessary to promote a compelling state interest.[11] The same close judicial scrutiny is applied to discriminations based on alienage. A state must meet this "heavy burden of justification"[12] if its exclusion of all aliens from either the state bar association[13] or competitive civil service employment[14] is to be permitted.

Classifications based on wealth also are "traditionally disfavored:"

> To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.[15]

However, wealth discrimination, in and of itself, is not an "adequate basis for invoking strict scrutiny."[16] Strict review of "wealth classifications has been applied only where the discrimination affects an important individual interest."[17] The two criteria which normally will cause the invocation of strict scrutiny overlap in wealth discrimination cases. "Suspect classifications" and "fundamental rights" both may be discerned in the same fact situation.

11. McLaughlin v. Florida, 379 U.S. 184 (1964) and Korematsu v. United States, 323 U.S. 214 (1944).

12. *McLaughlin, supra* note 11 at 185.

13. *In re* Griffiths, 413 U.S. 717 (1973).

14. Sugarman v. Dougall, 413 U.S. 634 (1973).

15. *Harper, supra* note 6 at 668.

16. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973).

17. *Id.* at 102, note 61 (Marshall, J., dissenting).

In *Harper*, for example, it is stated that, "Wealth, like race, creed or color, is not germane to one's ability to participate in the electoral process,"[18] thus identifying the criterion of a suspect classification, and that, "the right to vote is too precious, too fundamental to be so burdened," thus identifying the criterion of a fundamental right.[19]

State statutory and constitutional schemes are not uniformly subjected to strict scrutiny. The Federal Courts, rather, generally presume that the laws of a state are constitutionally sound: the law under examination must be "wholly irrelevant to the achievement of the regulation's objectives,"[20] in order to fail. "If any state of facts reasonably may be conceived to justify the statutory scheme,"[21] that scheme is constitutionally permissible.

Under the "rational basis" test, "state legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."[22] Such a "wide scope of discretion" allows states the necessary latitude to conduct "effective regulation in the public interest."[23]

The presumption favoring constitutionality, however, does not attach to statutes which grant the franchise to residents on a selective basis. Such classifications have been carefully scrutinized to determine if each citizen has the opportunity for equal participation in the electoral process. The presumption of constitutionality gives way

18. 383 U.S. at 668.

19. 383 U.S. at 670.

20. Kotch v. Board of River Pilot Commissioners, 330 U.S. 552, 556 (1947).

21. McGowan v. Maryland, 366 U.S. 420, 426 (1961).

22. *Id.* at 425-426.

23. *Kotch, supra* note 20 at 556.

to strict scrutiny. It yields to the more stringent test because of the basis for the approval normally given to state law:

> [It is] based on an assumption that the institutions of state government are structured so as to represent fairly all people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.[24]

B. A Narrowed Application of the Test of Strict Scrutiny Would Be Inapplicable to the Case at Hand.

It has been argued in some quarters[25] that recent refusals by the Court to strictly scrutinize certain statutes, may be the harbingers of a severely narrowed application, or complete demise, of that test. *San Antonio Independent School District* v. *Rodriguez*[26] and *Rosario* v. *Rockefeller*[27] are cited as supporting this view. This thesis, even if correct, does little to shore up constitutional defects in the Texas plan.

The *Rodriguez* Court disagreed with the lower court holding that a school financing system was based on wealth and hence was a "suspect classification" to be strictly scrutinized. Mr. Justice Powell wrote that the district court's conclusion was arrived at "through a simplistic analysis"[28] which ignored the basic "threshold"[29] questions

24. *Kramer, supra* note 2 at 628.

25. Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer* v. *Union Free School District No. 15*, 15 Ariz. L. Rev. 457 (1973).

26. 411 U.S. 1 (1973).

27. 410 U.S. 752 (1973).

28. 411 U.S. at 19.

29. *Id.*

required of Equal Protection determinations. The unposed questions should have asked whether the poor as a class were capable of being defined in customary Equal Protection terms, and whether the relative nature of their deprivation was of "significant consequence."[30]

The Court found that while the class was undelineated, the claimed discrimination in *Rodriguez* might have been described as running against (1) persons with incomes below a certain level, (2) persons relatively poorer than other persons, or (3) persons residing in relatively poorer school districts.[31] The issue was framed as being whether the state had "been shown to discriminate on any of these possible bases and, if so, whether the resulting classification may be regarded as suspect."[32]

Persons with incomes below a certain level were not shown to be discriminated against by the state law. In making this determination, the other cases of wealth discrimination previously decided by the Court were examined. The shared characteristics of those cases were the inability to pay for the desired benefit and the "absolute deprivation of a meaningful opportunity to enjoy that benefit."[33] This first category of poor was shown not to be discriminated against by the financing system because no evidence established that its members were concentrated in the poorest districts. Moreover, the poor in industrial areas might well be located in relatively wealthy districts. The *Rodriguez* appellees also failed to show that the impecunity of the class caused an "absolute deprivation of the desired benefit."[34] The Court held that no such depriva-

30. *Id.*

31. 411 U.S. at 19-20.

32. 411 U.S. at 20.

33. *Id.*

34. 411 U.S. at 23.

tion had occurred: The state had met its self-imposed minimal standards and children in all districts were guaranteed an adequate education.

The Court also discarded the second and third potential definitions of a disadvantaged poor class. The Court could discern no factual basis "upon which to found a claim of comparative wealth discrimination"[35] against the second category, the "relative poor". The final category, composed of persons in the poorer school districts, was neither reduced to "a position of political powerlessness"[36] nor subjected to any of the other "traditional indicia of suspectness."[37] Thus, the Court disallowed the application of strict scrutiny on the grounds of a suspect classification.

The class of persons delineated in the instant case is totally dissimilar to the *Rodriguez* categories. Eligible Fort Worth voters are divided into two classes by the Texas constitutional and statutory rendering requirements. Those who do not render cannot vote in bond elections and are thereby disenfranchised in elections which affect the citizenry as a whole.

The *Rodriguez* appellees additionally urged that education is a fundamental right entitled to the protection of strict scrutiny. If explicitly or implicitly guaranteed by the Constitution, a right may be said to be fundamental, and any infringement upon that right will be carefully and meticulously scrutinized.[38] The Court reaffirmed that "education is perhaps the most important function of state and local governments,"[39] but was unpersuaded that it

35. 411 U.S. at 27.

36. 411 U.S. at 28.

37. *Id.*

38. 411 U.S. at 33-34.

39. 411 U.S. at 29 quoting Brown v. Board of Education, 347 U.S. 483 (1954).

was a fundamental right. The appellees sought to place education within the sphere of strict judicial scrutiny by arguing that its essential relation to the First Amendment Rights made it implicitly fundamental. This argument was rejected.

> [W]e have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* or the most *informed* electoral choice.[40]

According to *Rodriguez*, education may assist fundamental rights, but it cannot thereby become fundamental.

The Texas rendering requirement, unlike the school financing scheme, *does* intrude on "the constitutionally protected right to participate in elections on an equal footing with other citizens in the jurisdiction."[41] Although the right to vote in state elections is "nowhere expressly mentioned"[42] in the Constitution, "the right of all persons to vote, once the state has decided to make it available to some, becomes a basic one under the Constitution."[43]

In *Rosario*, the Court upheld a New York statute which required persons wishing to vote in a political party's primary to enroll in that party at least thirty days prior to the last general election preceding the primary. The would-be voter who challenged the registration provision argued that in order to be held constitutional, the provision would have to be necessary to promote a compelling state interest. The Court did not accept that contention because in the cases cited in support of strict scrutiny "the state totally denied the electoral franchise to a particular class of resi-

40. 411 U.S. at 36 (emphasis original).

41. 411 U.S. at 34, note 74 *quoting Dunn* v. *Blumstein*, *supra* note 4 at 336.

42. *Harper*, *supra* note 6 at 665.

43. *Rosario*, *supra* note 27 at 764 (Powell, Douglas, Brennan, Marshall, J.J., dissenting).

dents, and there was no way in which the members of that class could have made themselves eligible to vote."[44]

The New York law did not absolutely disenfranchise the plaintiff class, it "merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."[45] The law was adopted in service of the goal of preserving "the integrity of the electoral process."[46] The declared supporters of a particular party were kept within their party's primary. Party "raiding" or "crossovers" were effectively curtailed.

Rosario cannot be read as allowing onerous conditions to be placed on voter registration. It would be untenable to argue that the poll tax could be revived because "members of the class could [make] themselves eligible to vote."[47] It is equally clear that the unconstitutional practices struck down in *Williams* v. *Rhodes*[48] and *Bullock* v. *Carter*[49] could not be reinstated just because potential candidates could make themselves eligible to be placed on the ballot.

A Fort Worth voter might make himself eligible to vote in a bond election, but the rendering requirement is totally unrelated to "the integrity of the electoral process."[50] As the District Court correctly pointed out, *Rosario* does not stand for the allowance of a conditional right to vote based on submission to taxation.[51]

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44. 410 U.S. at 757.

45. *Id.*

46. 410 U.S. at 761.

47. 410 U.S. at 757.

48. 393 U.S. 23 (1968).

49. 405 U.S. 134 (1972).

50. 410 U.S. at 761.

51. Stone v. Stovall, 377 F. Supp. 1016, 1020, note 8 (W.D. Tex. 1974), *prob. juris. noted sub nom.* Hill v. Stone, 95 S.Ct. 37 (1974) (mem.).

In urging that *Rodriguez* and *Rosario* have confined the test of strict scrutiny to "restricted circumstances,"[52] Appellant has overlooked the fact that the Texas rendering scheme creates such a circumstance. Even if the Court has checked the "expansibility of the list of fundamental rights,"[53] the right to vote in local elections is constitutionally protected. A radical and, as yet, unforeseen demise of strict scrutiny would have to occur before the Texas plan could prevail. It is submitted that Appellant's argument, when fully developed, suggests that the Court disregard or misapply a series of decisions which safeguard equal political participation.

C. Strict Scrutiny Is the Test to Be Applied to Any Alleged Dilution or Debasement of Voting Rights in a Unit of Local Government Having a Broad Range of Impacts on All Citizens.

The District Court holding is based in large part upon *Reynolds* v. *Sims*.[54] The extensions of the *Reynolds* standard, as set out in *Avery* v. *Midland County*,[55] *Kramer* v. *Union Free School District*,[56] *Cipriano* v. *Houma*,[57] *Hadley* v. *Junior College District*[58] and *Phoenix* v. *Kolodziejski*,[59] together with its exception, as applied in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*,[60] comprise much of the body of law applicable to the case at hand.

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52. Brief of Appellant at 21.

53. Goodpaster, *The Constitution and Fundamental Rights*, 15 Ariz. L. Rev. 479, 500 (1973).

54. 377 U.S. 533 (1964).

55. 390 U.S. 474 (1968).

56. 395 U.S. 621 (1969).

57. 395 U.S. 701 (1969).

58. 397 U.S. 50 (1970).

59. 399 U.S. 204 (1970).

60. 410 U.S. 719 (1973).

The lower court agreed with Appellees that "the state, through its rendering requirement, has divided its otherwise eligible voters into two classifications, one of which cannot vote in bond elections."[61] The state was required to "justify the exclusions under the harsh 'compelling state interest' test"[62] because it had denied some residents the right to vote. This test previously has been applied to various classifications which had either diluted or denied voting rights.

In *Reynolds*, the Court held that each citizen is guaranteed, under the Equal Protection Clause, the opportunity for a full and effective voice in his state's legislature. A dilution or debasement of this right through the malapportionment of voting districts is violative of the Equal Protection Clause. The facts before the *Reynolds* Court showed that glaring discrepancies existed among the populations of the various legislative districts, with the result that residents of different districts did not have votes of equal weight. Reviewing the state law authorizing the malapportionment with strict scrutiny, the Court held that legislative apportionment must be based on population:

> The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places, as well as all races.[63]

The doctrine of "one person, one vote" was extended to local government in *Avery* v. *Midland County*.[64] The Court recognized that regardless of how the state exercises its power, whether directly or through a subdivision, the

61. *Stone*, *supra* note 51 at 1019-20.

62. *Id.* at 1020.

63. *Reynolds*, *supra* note 54 at 568.

64. *Supra* note 55.

limits of that power are proscribed by the Equal Protection Clause. Like *Reynolds*, *Avery* is concerned with malapportionment. Population imbalance in local voting units, in this case the county commissioners' districts, had diluted the strength of the county's only urban area, while artificially bolstering that of the less populous areas. The urban center, having a population far greater than all other combined areas of the county, was represented by one commissioner, while the remainder of the county was represented by three commissioners.

The Court held that every qualified resident had the right to a ballot of equal weight. The facts of *Avery* supported such a ruling because certain local governmental entities, like their statewide counterparts, engage in diverse governmental functions affecting the citizenry as a whole. The county commissioners' court qualified as such because it possessed the "power to make a large number of decisions having a broad range of impacts on all the citizens of the county."[65] Substantial variations from equal population within district boundaries of units with "general responsibility and power for local affairs"[66] cannot be sanctioned.

In applying the rule in *Reynolds* to *Avery*, the Court reserved for future consideration the issue of whether the rule would be applicable to local governments having an *unequal* effect on different groups of citizens:

> Were the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most

65. 390 U.S. at 483.

66. *Id.*

affected by the organization's functions. That question, however, is not presented by this case.[67]

Avery was limited to "units of local government having general governmental powers over the entire geographic area served by the body."[68]

D. Citizens of Requisite Age and Residency May Not Be Denied the Right to Vote in Local Elections in Which They Are Substantially Interested and Affected.

The Equal Protection Clause also reaches statutory classifications which deny the right to vote. While *Reynolds* and *Avery* dealt with population imbalance and its resultant weighted voting, the case of *Kramer* v. *Union School District*[69] was concerned with the outright denial of voting rights to a particular class. In striking down the law authorizing this practice, the Court applied "no less rigid examination to statutes *denying* the franchise" than to statutes which might "dilute the effectiveness of some citizens' votes."[70]

The challenged statute restricted voting in local school board elections to resident citizens over the age of 21 years who also were (1) owners or lessees of real property within the district, (2) a spouse of an owner or lessee, or (3) a parent or guardian of a child enrolled in a district school during the preceding year. The state asserted that it had a legitimate interest in limiting the vote to "those primarily interested in such elections."[71] In addition to the parents

67. 390 U.S. at 484.
68. 390 U.S. at 485.
69. *Supra* note 56.
70. 395 U.S. at 626 (emphasis original).
71. 395 U.S. at 631.

of school children, who have an obvious interest, the state argued that owners of real property, who paid taxes to support the schools directly, and lessees of real property, who paid these taxes indirectly, were "primarily interested."

In closely scrutinizing the restriction placed on the excluded voters, the Court found that the statute included "many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude[d] others who have a distinct and direct interest in the school meeting decisions."[72] The excluded class member who brought suit argued that, although he was neither a parent nor a real property owner or lessee, he and other "members of the community have an interest in the quality and structure of public education."[73]

By crediting the class members with having an interest, the Court recognized that a person need not financially support the school or be responsible for a student to have a justiciable interest in public education. In sum, the persons disenfranchised for board elections were not "substantially less interested or affected than those the statute includes."[74]

Left open, however, was the issue of whether the state might be permitted to limit the franchise in situations where one group of citizens actually was "primarily interested or affected"[75] by the activities of the unit of government. The *Kramer* decision turned upon the fact that the statute was not "sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to

72. 395 U.S. at 632.
73. 395 U.S. at 630.
74. 395 U.S. at 632.
75. *Id.*

justify the denial of the franchise."[76] The statute was imprecise, wrongfully including "interested" citizens within its prohibition. It was possible, therefore, that a carefully drawn statute might withstand the constitutional test. But the Court noted:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.[77]

Decided on the same day as *Kramer* was the suit of *Cipriano* v. *City of Houma*.[78] At issue was the constitutionality of a state law which, like that of *Kramer* forbade a group of citizens to vote in a certain election. The two suits differed from one another in that the purpose of the *Cipriano* election was not to choose public officials, but was to determine if utility revenue bonds should be issued. The municipality owned the utility systems and planned to use the bond sale proceeds to improve the city's gas, water and electric service. Approval by a majority of the property taxpayers, representing a majority of the value of all assessed property owned by the voters in an election, was necessary for the bonds to be isued.

The city resisted the attack on the state law which authorized the limited franchise, maintaining that the property owners had a " 'special pecuniary interest' in the

76. 395 U.S. at 633.

77. 395 U.S. at 626-27.

78. *Supra* note 57.

election, because the efficiency of the utility system directly affects 'property and property values' and thus 'the basic security of their investment in [their] property [is] at stake.' "[79]

Because the revenue bonds were to be paid by utility operations, supported in turn by all persons who used those services, the interest of the property owners was no greater than any other utility subscriber. The respective interests of the citizenry were equal:

> [T]he benefits and the burdens of the bond issue fall indiscriminately on property owned and non-property holder alike.[80]

Consequently, the statute did not satisfy the "exacting standards of precision"[81] required of limitations upon the franchise.

E. The Test of Strict Scrutiny Is Applicable to Governmental Units Having Governmental Powers Less Than Those Examined in Avery v. Midland County.

In *Hadley* v. *Junior College District*,[82] the "one person, one vote" doctrine of *Reynolds* was examined once again. The voting districts for junior college trustees were challenged as being malapportioned. The Court held that the trustees must "be apportioned in a manner that does not deprive any voter of his right to have his own vote given

79. 395 U.S. at 704.

80. 395 U.S. at 705.

81. 395 U.S. at 706 *quoting Kramer, supra* note 56 at 632.

82. *Supra* note 58.

as much weight, as far as is practicable, as that of any other voter in the junior college district."[83]

As in *Avery*, the touchstone was the "general governmental powers over the entire geographic area"[84] possessed by the board of trustees. Although its powers were not as broad as those of the Midland County Commissioners, the trustees, nonetheless, performed important governmental functions which were "general enough" and had "sufficient impact throughout the district"[85] to make the trustee selection process answerable to the Fourteenth Amendment. Moreover, the Court held that:

> [A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in the election. . .[86]

The Court stressed, as it had done in the past, that this rule might not reach the extremes of the governmental spectrum:

> It is of course possible that there might be some case in which a state elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with Reynolds, supra, might not be required. . .[87]

Concrete exceptions might exist, but they had yet to be brought before the Court.

83. 397 U.S. at 52.
84. 397 U.S. at 53 *quoting Avery, supra* note 55 at 485.
85. 397 U.S. at 54.
86. 397 U.S. at 56.
87. *Id.*

F. The Indirect Tax Contributions Made Through Rents and Costs by Residents Owning No Real Property Must Be Taken into Account in Weighing Equal Protection Claims.

No exception to the rule in *Kramer* was to come forth in *Phoenix* v. *Kolodziejski*,[88] the next case to test a restrictive franchise. The issue before the *Phoenix* Court was stated as follows:

> Does the Federal Constitution permit a state to restrict to real property taxpayers the vote in elections to approve the issuance of general obligation bonds?[89]

The Court affirmed the lower court holding that the restriction was unconstitutional under the guidelines of *Cipriano* and *Kramer*.

The City of Phoenix took the position that general obligation bonds, unlike the revenue bonds of *Cipriano*, place an unavoidable burden on the real property owners because the bonds are "in effect a lien on the real property subject to taxation."[90] Because of this special status, the State of Arizona felt justified in recognizing "the unique interests of real property owners."[91] The entire community would benefit from the civic improvements caused by the bonds' passage, but the burden was to be placed on the property owners.

This argument failed because the Court found that:

> The differences between the interests of property owners and the interests of non-property owners are

88. *Supra* note 59.
89. 399 U.S. at 205.
90. 399 U.S. at 208.
91. *Id.*

not sufficiently substantial to justify excluding the latter from the franchise.[92]

This was obviously the case as to a portion of the debt service requirements of the bonds. Revenues from other local taxes paid by both property holders and non-property holders were to be applied to service the bonds. With non-property owners contributing to the bond servicing, it was difficult to maintain that they did not have an interest equal to the owners. Stated differently, the owners could not be said to have a special interest.

It was equally difficult to overlook the significant interest non-owners had in the public improvements to be financed by the bonds. All citizens are affected by the facilities and services a city offers the public at large. One need not be financially affected to have an interest in parks and playgrounds, police and public safety buildings, and libraries.

The main thrust of *Phoenix*, however, is not the protection of these clearly evident interests, but the recognition of the indirect tax burden borne by the non-owners. The Court took into account the fact that property taxes, the very basis for extending exclusive voting privileges to the owners, are also paid by non-owners. The payment is indirect, but it is meaningful: Landlords pass property taxes on to the renter, while commercial establishments pass the taxes on to the consumer. The property tax is a business expense ultimately paid by persons other than the property owner. A selective franchise, granting the owners the power to decide civic issues affecting all citizens is constitutionally defective.

92. 399 U.S. at 209.

II. The Holding in Salyer Land Co. v. Tulare Lake Basin Water Storage District Is Inapplicable to the Case at Hand.

Phoenix, like the other progeny of *Reynolds*, required the statute in question to be necessary to promote a compelling state interest. A particular statutory classification might either restrict the franchise or dilute the effectiveness of the franchise, but in both cases the statute was strictly scrutinized. *Kramer* invoked the test of strict scrutiny when a restriction denied some citizens "any effective voice in the governmental affairs which substantially affect their lives."[93] *Hadley* applied strict scrutiny when citizen participation in a "popular election [of persons] to perform governmental functions"[94] had been diluted.

The exception to the doctrine of "one person, one vote", the possibility of which both these cases acknowledged, finally took form in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*.[95]

The facts of *Salyer* combine elements previously seen in both the restriction and dilution cases. The board of directors of a California water storage district was chosen by an electorate restricted to real property owners whose votes then were weighted according to the amount of land the voter owned. As land ownership was the sole requirement, corporations were allowed to vote. Residency was not required.

In upholding these provisions, the Court did not subject them to strict scrutiny:

93. 395 U.S. at 627.

94. 397 U.S. at 56.

95. *Supra* note 60.

> Although relying on the fact that prior cases had left open the possibility that preferential voting for special-function units might be valid, the *Salyer* Court did not apply the strict scrutiny actually used in those cases to review the permissibility of voting restrictions and dilutions.[96]

Instead, the Court employed the "rational basis" test, which asks if the statutory scheme is "wholly irrelevant to the achievement of the regulation's objectives"[97] or "if any state of facts reasonably may be conceived to justify"[98] the scheme. Under this standard *Salyer* held that the state could rationally allow those whose land would be subjected to taxes to exert control over the water storage district. It was reasoned that the state could conclude that without a guarantee of electoral primacy, a sufficient number of landowners might not be inclined to vote for the creation of the district.

The excluded lessees might have interests similar to landowners, but the "rational basis" test merely inquires if "any reasonable state of facts may be conceived to justify the exclusion."[99] Such a conception, noted by the Court, maintained that leaseholds might be manipulated by their owners, whereby short-term leases, and incidental voters, would be created for the purpose of controlling an election. California could limit the franchise to prevent such an occurrence as well as to encourage owners to participate without fear of election irregularities.

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96. *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 94, 97 (1973).

97. 410 U.S. at 730 *quoting Kotch* v. *Board of River Pilot Commissioners*, *supra* note 20 at 556.

98. 410 U.S. at 732 *quoting McGowan* v. *Maryland*, *supra* note 21 at 426.

99. *Id.*

Similarly, the state could allow weighted voting. The benefits to the land are "uniform as to all acres affected"[100] and the cost to each landowner is the same per acre. Writing for the majority, Mr. Justice Rehnquist agreed with the lower court finding that "the benefits and burdens to each landowner . . . are in proportion to the assessed value of the land."[101] Therefore, the California legislative decision to permit voting in the same proportion was found to be rationally based.

Salyer applied the less severe test because the water storage district exercised limited functions which disproportionately affected landowners:

> [T]here is no way that the economic burdens of the district operations can fall on residents *qua* residents, and the operation of the districts primarily affect the land within their boundaries.[102]

The board of directors, then, are "functionaries whose duties are . . . far removed from normal governmental activities."[103]

Salyer does not spell an end to the strict judicial protection of those interests recognized in the *Reynolds* line of cases. The recognition of a citizen's interest in education, unconnected to any economic stake,[104] still is valid. The recognition of a citizen's interest in civic improvements, brought about in part by indirect tax contributions through rents and costs,[105] still has force and effect.

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100. 410 U.S. at 734.

101. *Id.*, *quoting* 342 F. Supp. 144, 146 (E.D. Cal. 1972).

102. 410 U.S. at 729.

103. *Hadley* v. *Junior College Dist.*, *supra* note 58 at 56.

104. *Kramer* v. *Union Free School Dist.*, *supra* note 56.

105. *Phoenix* v. *Kolodziejski*, *supra* note 59.

The importance of *Salyer* lies in its analysis of the disparate interests of competing groups. The analysis suggested by the Court initially takes into account the interests of definable groups classified as such by statute. A finding that one group's interest is disproportionately affected by a "far removed" unit of government will cause strict protection of the less affected group to be abandoned. The infringements upon the latter group's right will be measured by the "rational basis" test.

The *Salyer* Court did not suggest that preferential review would be granted merely because one group might be affected to a greater degree, or in a different manner, than another group. The "effect" must reach a disproportionate level: that it is greater or different is not enough. Strict scrutiny of infringements on the rights of a competing group will not give way unless this level is attained.

The test announced by the Court is said to have a potential for misapplication because:

> "Although the result in *Salyer* seems sound, a superficial analysis in future cases could give inadequate protection to the constitutional right of equal political representation."[106]

This potential lies in the interrelated use of the phrases "specialized units of government" and "disproportionate effects." The combined use of these analytic tools "encourage[s] a tendency to presume that, if a unit does engage in activities not normally provided by a governmental unit, its impact will be disproportionate."[107] The author of this thesis warns that it is possible to have a specialized

106. Note, *Salyer Land Co. v. Tulare Lake Basin Water Storage District: Opening the Floodgates in Local Special Government Elections*, 72 Mich. L. Rev. 868 (1974).

107. *Id.* at 884.

unit that has a substantially equal effect on all citizens.[108] Effects that vary to a small degree should not be construed as disproportionate just because they emanate from a unit far removed from normal government activities.

The College District would urge that even if a bond election could be viewed as a specialized governmental function, it should not be concluded automatically that the effect of the bond's passage is disproportionate.

Reynolds spoke of legislators representing "people, not trees or acres,"[109] and of representatives "elected by voters, not farms or cities or economic interests."[110] In *Salyer* the Court examined a governmental unit whose purpose was held to be so limited that it approximates the references made in *Reynolds*. The water district "focuses on the land benefited, rather than on people as such."[111]

The case at hand and that of the El Paso Junior College District are concerned with general purpose districts which substantially affect all citizens.[112] Both districts focus directly upon people and any limitation upon the franchise must be examined by the *Reynolds* line of cases.

Texas elections conducted "for the purpose of issuing bonds or otherwise lending credit or expending money or assuming any debt"[113] unconstitutionally limit the franchise to qualified residents who own taxable property and who have rendered same for taxation. The classification set out in the constitutional and statutory provisions of

108. *Id.*

109. 377 U.S. at 562.

110. *Id.*

111. 410 U.S. at 730.

112. *See infra* text accompanying notes 127 through 136.

113. TEX. CONST. art. VI §3a.

Texas contains "an exclusion from what [is] otherwise a delineated class."[114] In this respect, the classification is much like that of *Kramer*: the franchise is open to all residents of requisite age and citizenship, but with exceptions. The *Salyer* classification enfranchised landowners regardless of residency, but extended the franchise no further. For the *Salyer* Court, allowing others to vote would have required engrafting a wholly new class of voters upon the statutory scheme.[115] This is not the case in Texas where the state has granted the franchise universally and then placed a restriction, inconsistent with Equal Protection, upon that grant.

The District Court did not err when it wrote that the principle of "one man, one vote" applied "to the City of Fort Worth, a unit of local government exercising general governmental power."[116] The City obviously performs broad governmental functions, one of which is the maintenance of a library system. The financial stake of renderers is not disproportionate to the non-economic stake of all Fort Worth citizens in public libraries. Any difference between the tangible interests of the citizens is minimized by the indirect contributions by non-renderers to the taxes which will service the bonds.[117] The *Salyer* ruling does not apply to the case at hand.

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114. 410 U.S. at 730.

115. *Id.*

116. *Stone*, *supra* note 51 at 1021, note 9.

117. This does not mean that the franchise could be extended *ad infinitum* to consumers "in far away metropolitan areas" who might be arguably affected by taxes on Fort Worth goods and services. The *Salyer* Court expressed concern over such an argument because the Tulare Lake Basin Water Storage District did not condition voting on residency, but upon land ownership. 410 U.S. at 30-731. In general purpose districts, few of which allow corporations or non-residents to vote, the franchise would be proscribed by citizenship, residence and age requirements.

III. The Texas Constitutional and Statutory Provisions Restricting the Franchise in General Obligation Bond Elections to Persons Who Have Rendered Property for Taxation Is Violative of the Equal Protection Clause of the Fourteenth Amendment.

A. The Restrictive Franchise Excludes Citizens Who Have a Stake in, and Will Be Affected by, the Outcome of General Obligation Bond Elections.

The restrictions of the Texas franchise differ somewhat from the laws invalidated in *Kramer* and *Phoenix*. The state, consequently, has offered different justifications for its limited franchise. All defenses of its voting scheme center on the fact that Texas does not limit voting rights to real property holders only. All property, except as may be exempted, is subject to taxation,[118] and any person who renders his real, personal or mixed property may vote in a bond election,[119] provided he is otherwise qualified. As the Texas Supreme Court stated in *Montgomery Independent School District* v. *Martin*,[120] the elector who renders a bicycle may cast a vote equal to that of a man who owns a herd of cattle.[121]

Montgomery justifies the state voting classification on the grounds of "sound government" and "equal treatment of all citizens."[122] By conditioning the vote upon rendering property for taxation, it is reasoned, an inducement is provided "for those who wish to participate in the decision

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118. TEX. REV. CIV. STAT. ANN. art. 7145 (1960).

119. TEX. ELECTION CODE ANN. arts. 5.03, 5.04 (Supp. 1974).

120. 464 S.W. 2d 638 (Tex. 1971).

121. *Id.* at 640. *See* Handy v. Holman, 281 S.W. 2d 356 (Tex. Civ. App.—Galveston 1955, no writ).

122. 464 S.W. 2d at 641.

making process . . . to assume their rightful portion of the burden they help to create."[123] *Montgomery* is premised upon a feeling that it is basically unfair to allow non-renderers to vote, "and at the same time permit them to avoid their fair share of the resulting obligation."[124] Because there is a correlation between the rights of the citizen and the obligations of citizenship,[125] it is permissible to induce the citizenry to come forward to share in the tax burden. To allow non-rendering citizens to place rendering citizens under a financial obligation by the issuance of bonds "would confer preferential rights."[126]

While the statutes examined in *Kramer* and *Phoenix* conditioned the franchise differently than does Texas, the rights defined in those cases have direct bearing on the case at hand. While renderers (assuming that they subsequently pay the tax) will be financially affected by a general obligation bond election, other citizens will be substantially affected in the election's outcome. Under *Kramer*, "the Court's concept of 'interest' will not permit the exclusion of residents who do not own property, since they share a concern for and a stake in the quality"[127] of general civic improvements. Under *Phoenix*, any substantial difference between owners and non-owners is minimized by the indirect contribution to property taxes by non-owners through increased rents and costs.

The Texas Court defines "affect" exclusively in economic terms, but fiscal considerations are not the only

123. *Id.*

124. 464 S.W. 2d at 641-42.

125. Markowsky v. Newman, 134 Tex. 440, 136 S.W. 2d 808 (1940).

126. 464 S.W. 2d at 642.

127. *The Supreme Court, 1968 Term*, 83 Harv L. Rev. 7, 81 (1969).

interests to be weighed in examining Equal Protection challenges:

> [T]he Equal Protection Clause is not satisfied by a finding that it was reasonable to recognize the special interest property owners have in a bond issue; the laws are unacceptable in they exclude non-property electors who have a substantial stake in the result of the election.[128]

Paralleling the argument that citizens are substantially affected only in economic terms, is the argument that non-renderers will not vote "either cautiously or intelligently" unless they have an economic stake in the election.[129] Intelligence or caution have never been based on economic factors, and to argue that they are is to urge the introduction of "wealth as a measure of a voter's qualifications."[130] A non-rendering citizen of Fort Worth may determine the need for a library with a facility equal to the wealthiest citizen's.

One of the several cases held inapplicable by the *Montgomery* Court was *Stewart* v. *Parish School Board*,[131] where a three judge court examined a voting scheme similar to that of Texas. Bond electors were required to be property taxpayers. The Louisiana Constitution additionally required that all bond issues be approved by voters owning a majority of the assessed property, thereby giving more weight to the vote of the large property owners. *Stewart* held both the exclusion of non-property taxpayers and the dilution of the vote of the small property owners to be in violation of the Equal Protection Clause.

128. Stewart v. Parish School Board, 310 F. Supp. 1172, 1176 (E.D. La. 1970), *aff'd*, 400 U.S. 884 (1970) (mem.).

129. Brief of Appellant at 18.

130. *Harper*, *supra* note 6 at 668.

131. *Supra* note 128.

Montgomery distinguished *Stewart* as turning upon the inequity of the weighted voting, and as having, therefore, no effect on the Texas plan.[132] By ignoring the case in its entirety, the Texas Court failed to consider the portion of the opinion that was applicable: the finding that the limited franchise was unconstitutional. This especially merited discussion because the Louisiana Law, like the law of Texas, provided that "all properties situated within the state . . . shall be subject to taxation."[133]

The Louisiana restriction, according to *Stewart*, was based on the apparent assumption that property owners have a special pecuniary interest. This is not unlike *Montgomery's* finding that persons permitted to vote "must assume their rightful portion of the burden they help to create."[134]

The *Stewart* Court questioned the presumption that property owners are more competent to vote in bond elections than non-property owners, noting that under such a presumption it is possible to disenfranchise a bank president who happens to rent rather than own his own home.[135] It required that "the general public interest must be weighed against allowing a particular private group decide whether a public school be built and where."[136] In Texas, renderers hold a veto power over the civic improvements desired by the public at large, many of whom have non-economic or indirect economic stakes in those improvements.

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132. 464 S.W. 2d at 640.

133. LA. STAT. ANN. art 47: 1951-1956.

134. 464 S.W. 2d at 641.

135. 310 F. Supp. at 1178 *quoting* Note, 55 Va. L. Rev. 559, 566 (1969).

136. 310 F. Supp. at 1178.

B. The Restrictive Franchise Is Not Necessary to Promote Any Compelling State Interest.

Montgomery alludes to the state's interest in "spreading the obligations of government equally",[137] but does not determine if Texas has a compelling state interest, and if the rendering scheme is necessary to promote it. The absence of any discussion of this issue has led one commentator to state:

> One reason for the avoidance of a direct confrontation with the compelling state interest test may rest in the apparent absence of such a constitutionally compelling interest. But again this forces one to question the wisdom of the supreme court in entirely avoiding an issue so fundamental to the equal protection clause. While the "obligation of citizenship" argument raised by the court merits some philosophical discussion, it is extremely questionable that the discusssion of an issue as important as voting rights and the compelling state interest question should be neglected under the auspices of a theoretical "you can't get something for nothing" attitude.[138]

Rendering appears to be an "interest" or goal in itself because the vote is said not to depend on actual payment of the tax.

If "sound government" and "equal treatment of all citizens" could be viewed as definable compelling interests, they are not served by the Texas Constitution and statutes. A citizen desiring to vote in a bond election, yet unwilling to reveal his full assets, could render personalty

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137. 464 S.W. 2d at 641.

138. Note, *Property Ownership Versus the Right to Vote: A Question of Equal Protection*, 25 Sw. L. J. 633, 643 (1971).

of small value and be allowed to cast a ballot. He thereby would avoid paying his fair share; indeed, he could refuse to pay *any* share and still be permitted to vote. Residents are not goaded into disclosing their wealth by the restrictive franchise:

> The law will achieve its purpose only for that minute segment of the electorate so close to destitution that to render any property necessitates rendering all. The restriction will thus compel few citizens to render all their property for taxation; consequently, it has little impact on revenue production. Therefore, no appropriate compelling state interest has been advanced to justify this restriction of the franchise.[139]

In the instant case, Judge Thornberry correctly focused on the questionable necessity of rendition when he asked, "If disenfranchisement can be avoided by rendering only a small portion of one's property, and a nearly valueless portion at that, how does the state further its interest in protecting the fisc?"[140]

C. The Restrictive Franchise Places an Unequal Burden on Citizens Who Own Property Unsought for Taxation by the State.

The inequity of Texas' restricted franchise is amplified by the state's irrational property taxation system. All citizens of requisite age and residency are potential property taxpayers and, by definition, voters in bond elections. *Montgomery* assumes, without directly speaking to it, that all citizens are under a duty to come forward and render their

139. Note, 49 Texas L. Rev. 1113, 1118 (1971).

140. *Stone, supra* note 51 at 1022.

property.[141] The only statute cited by the Court as related to this issue is Article 7145, which provides that, "All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."[142] The impetus for rendition, however, comes not from the state's ill-defined duty of citizenship, but from the local tax assessor-collector. This official is required as follows:

> . . . take a list of taxable property, real and personal, in his county and assess the value thereof in the man-

141. One of the most direct statements of the duty to render is not found in Title 122 of the Texas Revised Civil Statutes, the general taxation statutes, TEX. REV. CIV. STAT ANN. arts. 7041 *et seq.* (1960), but in Title 28 of the Texas Revised Civil Statutes. TEX. REV. CIV. STAT. ANN. art. 1043 (1963). Article 1043 states that each person, partnership and corporation owning property within the municipal corporation's limits shall "hand to the city assessor and collector a full and complete sworn inventory of the property possessed or controlled. . ." The annual time for rendition, however, has been held to be "directory" rather than "mandatory". Bose v. Ainsworth, 139 S.W. 2d 307 (Tex. Civ. App.—San Antonio 1940, error dismd.). Title 122 appears to leave the initiative in the hands of the assessor. TEX. REV. CIV. STAT. ANN. arts. 7151 (Supp. 1974), 7189 (1960). *See also* TEX. REV. CIV. STAT. ANN. art. 7152 (Supp. 1974). Professor Yudof has written:

> Texas statutes direct taxpayers to list or render all taxable property upon request by the assessor. Nonetheless, the only legal burden imposed on a taxpayer who fails to render voluntarily is the denial of access to the local board of equalization, which may grant an exception. Because rendition is not mandatory, the statutes require the assessor to call on every taxpayer to request a listing of all property. (citations omitted)
>
> Yudof, *The Property Tax in Texas Under State and Federal Law*, 51 Texas L. Rev. 855, 889-90 (1973).

The assessor is empowered to retroactively assess both real and personal property which he shall "discover" have not been assessed or rendered previously. TEX. REV. CIV. STAT. ANN. arts. 7207, 7208 (1960); Yamini v. Gentle, 488 S.W. 2d 839 (Tex. Civ. App.—Dallas 1972, writ ref. n.r.e.).

142. TEX. REV. CIV. STAT. ANN. art. 7145 (1960).

> ner following, to-wit: By calling at the office, place of business or the residence of the person, and listing the property required by law in his name, and requiring such person to make a statement under said oath of such property in the form hereinafter prescribed.[143]

Owners shall list for taxation, during a specific annual time period, all property "when required by the assessor, with reference to the quantity held or owned on the first day of January in the year for which the property is required to be listed or rendered."[144]

The assessor becomes "a sort of one-man legislature"[145] whose assessment and collection practices are inefficient and subject to local political pressure.[146] In addition, he indirectly dictates the size of the electorate in bond elections. Virtually every person he "calls upon" becomes a voter. If the potential taxpayer refuses to render, the assessor must make a "valid and binding"[147] assessment of the property "as if such property had been rendered by the proper owner thereof."[148] The assessor's placement of the property on the rolls, even without the owner's consent, entitles the owner to vote in bond elections, provided that he is otherwise qualified.[149] The number of bond issue

143. TEX. REV. CIV. STAT. ANN. art. 7189 (1960).

144. TEX. REV. CIV. STAT. ANN. art. 7151 (Supp. 1974).

145. 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX 4 (1963), *quoted* by Yudof, *supra* note 141 at 886.

146. "Most taxpayers would be outraged if the assessor actually complied with the applicable laws on the property tax base. An assessor who insisted on taxing personal property would be courting political suicide." Yudof, *supra* note 141 at 889.

147. TEX. REV. CIV. STAT. ANN. art. 7193 (1960).

148. *Id.*

149. *Montgomery*, *supra* note 120 at 641; Royalty v. Nicholson, 411 S.W. 2d 565, 575 (Tex. Civ. App.—Houston 1967, writ ref. n.r.e.).

voters is in direct proportion to the energy the assessor expends in seeking out property.

It is extremely doubtful that a property owner will even know of the possibility of rendering, much less actually undertake to render, unless he is requested to list his property. As the District Court observed, "The record fails to indicate the number of people who render, for taxation personalty other than automobiles, but we doubt that many do."[150] This doubt echoed the finding of the three judge court in *Stewart* where judicial notice was taken "of the fact that in Louisiana few individuals pay any personal property taxes; those who do pay a nominal tax usually based on the value of their automobile."[151] In Texas most personalty is not rendered because the assessor never requires its rendition. The discretion of the assessor is great and the tax base varies from county to county. Professor Yudof has written that the broad tax base which includes all property has eroded:

> [It] results from the helter-skelter, informal exemptions that assessors grant taxpayers. The net effect is that the laws of Texas give little indication of the true size of the tax base. In practice, personal property is rarely included - - - except for automobiles, which some 400 districts tax.[152] Likewise, business personal property is exempted in many districts, and inventory is assessed only after it has been largely depleted.[153]

A vast class of personal property owners are never required to render their property, yet they are disenfran-

150. *Stone*, *supra* note 51 at 1020.

151. *Stewart*, *supra* note 128 at 1173, note 3.

152. Taxing districts within El Paso County do not require the rendition of automobiles.

153. Yudof, *supra* note 141 at 889.

chised. That members of this class may offer property to the assessor on their own initiative cannot excuse an obvious discrimination: the state makes it more difficult for one class of citizens to vote in bond elections than for another class. A landlord may be required to render his real property and perhaps his automobile, while a renter who owns no automobile receives no such demand. Even if the landlord refuses to render, and the assessor places the property on the tax rolls, the landlord is entitled to vote. In either case, the landlord is made a voter in bond elections not through his own volition, but by the demand of the assessor. The landlord is sought out by the tax assessor, but the renter is forced to seek out the tax assessor. Moreover, the landlord may be several years delinquent in the payment of his taxes, but his status as an elector is unchanged.

Citizens of requisite wealth, therefore, have their voting rights conferred upon them by the assessor even though all citizens are under a duty to render.

The renter, however, becomes a voter only if he takes affirmative steps to render his theretofore unsolicited personal property. In so doing, the renter places on the tax rolls property that the landlord was never required to render. For the privilege of voting in bond elections, the renter assumes a tax liability on particular items the assessor has sought of no other citizen.

The burden placed on owners of property unsought by the tax assessor is violative of the Equal Protection Clause. Such owners have been placed in a class which is required to perform an act demanded of no other class. The result of this act is to render for taxation property which otherwise would be untaxed. Even if it could be said that the Texas plan is concerned with legitimate voting

standards and qualifications,[154] the administration of the plan is discriminatory.[155] The method by which a citizen becomes eligible to vote in a bond election is not even-handed; an identifiable class is discriminated against because of economic status.

The restricted franchise has "no relation to standards designed to promote intelligent use of the ballot."[156] The restriction is imposed in order to achieve an end wholly unrelated to voting: the rendition of property for the collection of taxes. Texas has a variety of ways to enforce this ostensible policy without intruding on voting rights. The state should address itself directly to its articulated interests, rather than indirectly and imprecisely seeking to foster them.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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154. *See, e.g.*, Lassiter v. Northampton Election Board, 360 U.S. 45 (1959).

155. *See, e.g.*, Louisiana v. United States, 380 U.S. 145 (1965).

156. *Harper, supra* note 6 at 666 *quoting Lassiter, supra* note 154 at 51.

CERTIFICATE OF SERVICE

I, Edward W. Dunbar, as counsel for the *amicus curiae* El Paso County Junior College District, and a member of the Bar of the Supreme Court, hereby certify that true and correct copies of the above foregoing Brief *Amicus Curiae* has been served upon the several parties, in compliance with Rule 33 of the Supreme Court Rules, by placing three copies in the mail, airmail postage prepaid, to S. G. Johndroe, Jr., City Attorney and Attorney for Appellees R. M. Stovall, S. G. Johndroe, Jr., Roy A. Bateman, Leonard E. Briscoe, Taylor Gandy, Jess M. Johnston, Jr., W. S. Kemble, Jr., John O'Neill, Ted C. Peters, Pat Reece, Mrs. Margaret Rimmer, and the City of Fort Worth, at 1000 Throckmorton Street, Fort Worth, Texas 76102; and that three copies were placed in the mail, airmail postage prepaid, to Don Gladden and Marvin Collins, attorneys for Appellees, at 702 Burk Burnett Building, Fort Worth, Texas 76102; and that three copies were placed in the mail, airmail postage prepaid, to John L. Hill, Attorney General of Texas and Larry F. York, Mike Willatt and G. Charles Kobdish, Assistant Attorney Generals, attorneys for Appellant, at Box 12548, Capitol Station, Austin, Texas 78711. All parties required to be served have been served.

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APPENDIX

TEX. CONST. art. VI, §3a

When an election is held by any county, or any number of counties, or any political sub-division of the State, or any political sub-division of a county, or any defined district now or hereafter to be described and defined within the State and which may or may not include towns, villages or municipal corporations, or any city, town or village, for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, only qualified electors who own taxable property in the State, county, political sub-division, district, city, town or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence.

TEX. CONST. art. VII, §3

One-fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred ($100.00) dollars valuation, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this State; provided, however, that

should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are composed of territory wholly within a county or in parts of two or more counties, and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one ($1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.

TEX. ELECTION CODE ANN. art. 5.03 (Supp. 1974)

When an election is held by any county, or any number of counties, or any political subdivision of the state, or any political subdivision of a county or any defined district now or hereafter to be described and defined within the state, and which may or may not include towns, villages, or municipal corporations, or any city, town, or village, for the purpose of issuing bonds or otherwise lending credit, or

expending money or assuming any debt, only qualified electors who own taxable property in the state, county, political subdivision, district, city, town, or village where such election is held, and who have duly rendered the same for taxation, shall be qualified to vote and all electors shall vote in the election precinct of their residence. Property shall be deemed to have been duly rendered for taxation, for the purpose of determining eligibility to vote in an election as provided in this code and in Article VI, Section 3a, of the Texas Constitution, only if the property was rendered to the county, city, district, or other political subdivision holding the election within the period of time fixed by law for such rendition, or was placed on the tax rolls by the tax assessor prior to the date on which the election was ordered, if the regular rendition period expired before that date.

TEX. ELECTION CODE ANN. art. 5.04(a)

(a) Before any person is allowed to vote in an election for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt, he shall sign and swear to an affidavit to the effect that he owns property, giving a description of one item, which has been duly rendered for taxation to the political subdivision holding the election at a time and in a manner which entitles him to vote in the election, as provided in Section 35 (Article 5.03) of this code. The voter's registration certificate number shall be shown on the affidavit, and it shall contain a statement that the affiant understands that the giving of false information in the affidavit is a felony punishable by a fine not to exceed $5,000 or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment.